

# Exhibit F

UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE  
OFFICE OF THE GENERAL COUNSEL  
PROCUREMENT LAW CONTROL GROUP  
WASHINGTON, DC 20548

In the matter of:

Helicopter Transport Services LLC

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B-400295

MEMORANDUM OF LAW

The United States Department of Agriculture, Forest Service (Agency), through its counsel, hereby responds, in accordance with the United States Government Accountability Office (GAO) Bid Protest Regulation 4 C.F.R. § 21.3(c), to the protest filed on June 24, 2008 (the protest) by Helicopter Transport Services (HTS) in the above-captioned matter. For the reasons set forth below, the Agency respectfully requests that the Comptroller General deny this protest.

HTS asserts three protest grounds. First, it challenges as irrational the rating HTS received on the two most important technical factors: aircraft technical capability and safety/risk management. As this memorandum will explain, and the Agency Report will support, HTS in fact received \_\_\_\_\_ and \_\_\_\_\_ rating it received on factor 2 was .

Second, as to the third most important technical factor, HTS claims the Agency's evaluation gave too much consideration to one of four past performance subfactors; however, ample documentation of complaints about HTS's past performance shows the Agency considered all four subfactors equally and supports . Third, HTS claims the Agency did not fully document its best value analysis, because it did not explain why

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it will  
in fact, that explanation  
appeared in the solicitation's instructions to offerors (as well as in later evaluation summaries),  
which stated the technical factors were significantly more important than price. So, despite  
HTS's  
contributed to its not receiving  
the five protested awards.

In short, the Agency's evaluation of HTS's proposal was well documented, reasonable,  
and consistent with the RFP's stated criteria and procurement regulations. Therefore, the protest  
is without merit and should be denied.

#### FACTS

##### 1. Solicitation and Relevant Instructions

HTS protests 5 out of 34 line items awarded under RFP No. AG-024B-S-08-9003 (the RFP) for heavy or medium exclusive use helicopters to use in fighting forest fires. The Agency issued the RFP March 3, 2008, for the purpose of procuring helicopters for its exclusive use during mandatory availability periods (MAPs), which varied by line item. Generally, the MAPs spanned the 2008 fire season; i.e., Summer and early Fall of 2008.

As stated in the Instructions to Offerors (included as section E of the RFP), the Agency intended to evaluate offers and award a contract without conducting discussions. Initial offers were to "contain your best terms from a price and technical standpoint." Agency Report, Tab 7, p. 210.<sup>1</sup>

Offerors were instructed to submit proposals in two parts: the business/cost proposal, and

the technical proposal. Tab 7, p. 211. There were four technical evaluation factors, listed in the RFP in descending order of importance, as follows: (1) aircraft technical capability; (2) safety/risk management; (3) past performance; and (4) organizational experience. *Id.* at 212.

<sup>1</sup> All further citations to the attached Agency Report will be in the following format: "Tab \_\_, p. \_\_."

The four technical factors, when combined, were significantly more important than price. *Id.* at 215. Award would be made to "those offerors whose proposals are technically acceptable and whose technical/price relationships are the most advantageous to the Government." *Id.* at 216.

The RFP informed offerors that the Forest Service might contact the references provided by the offeror or "other sources of information" in order to evaluate their past performance. Past performance, the third most important technical factor, was defined in the RFP by reference to the following four past performance sub-factors of equal importance:

- a) that you were capable, efficient, and effective
- b) that your performance conformed to the terms and conditions of your contract
- c) that you were reasonable and cooperative during performance

Tab 7, p. 215.

2. Source Selection Plan and Evaluation Process

a. *Technical Evaluation*

The Contracting Officer (CO) assigned a Technical Evaluation Team (TET) to review proposals under the four technical evaluation factors. Tab 7, p. 4. The TET devised a system under which it assigned point values of 1 through 5 to adjectival ratings, with 1 being best, and 5 being worst. Tab 5, p. 11. Points were assigned as follows: Exceptional (1); Acceptable (2); Neutral (3); Marginal (4) and Unacceptable (5). (For Factor 1, aircraft technical capability, proposals were deemed either Acceptable or Unacceptable, and therefore were rated either 2 or 5. Tab 7, p. 15.) Because the RFP listed the technical evaluation factors in descending order of importance, the TET weighed each factor accordingly, as follows:

TET members separately reviewed the proposals and then met as a group to discuss each vendor and arrive at a consensus score for each technical evaluation factor. *Id.* Once a consensus was reached as to each factor, the TET calculated a composite score that incorporated each factor's weight in the weighting scheme. As an example, a

*See also* Tab 2, ¶ 20

The procurement at issue in this protest differs from past procurements for exclusive-use helicopters in that the TET considered, in making award recommendations, the results of a computerized optimization model (OM). The Agency developed the OM in response to the complexity of last year's exclusive-use helicopter procurement, which also sought to award contracts based on best value, and which placed significantly more importance on technical factors than on price. Tab 2, ¶ 12. Last year, to ensure each evaluation factor received the appropriate consideration, the TET created and reviewed more than 250 spreadsheets comparing

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and the average price per pound (PPP)<sup>2</sup> (over the life of the contract, including option years) of each offered aircraft. Page 41 of Tab 6 shows the optimum as "May 22 Run," where each line item is matched to a specific recommended aircraft.<sup>3</sup>

To run the OM, the Agency entered the following information for each aircraft offered in response to the RFP:

- The aircraft tail number and whether the aircraft was bid to use a bucket or tank;<sup>4</sup>  
\_\_\_\_\_ (PPP) for that aircraft, for that line item, over a 4-year period);

was 1.9641.<sup>5</sup> This deviated by 1.35 percent from the best possible average adjectival score had the TET taken only adjectival score into consideration when making the awards. In other words, the deviation represented a tradeoff between awarding to the best technical proposal and awarding to a lower priced proposal that was not necessarily the best in terms of the technical evaluation parameter.

3. Evaluation of HTS's Proposal

The TET gave HTS consensus adjectival score \_\_\_\_\_, in other words:

Tab 6, p. 43.

For aircraft technical capability, the score HTS received -

A score of 1 (Exceptional) was not possible for that factor, as indicated by the blackened boxes on the TET worksheets. Tab 7, p. 15.

HTS also received .

for safety/risk management. For that factor,

Tab 2, ¶ 2.

safety/risk management. See Tab 5, at 13-19. The TET's Safety Group, which focused its review on safety/risk management, explained .

' score as

follows:

al." Tab 6, p. 142. Individual evaluator comments

also included,

<sup>5</sup> Similarly, taking the weighting scheme, total price, and technical score into account, the best average PPP was determined to be \$.2908. Taking the weighting scheme, PPP, and technical score into account, the best total cost was determined to be \$430,015,700. See Tab 6, p. 41.

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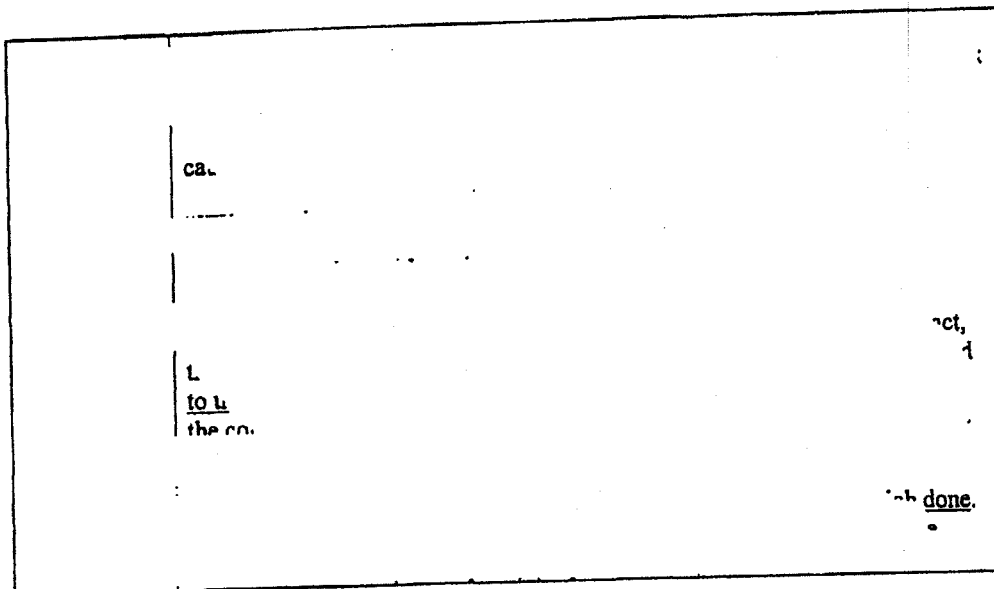
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(*Id.* at 138); and "The companies [sic] SMS looks good, but is still being implemented. If they follow through with the program it should be good." *Id.* at 147.

HTS received a score \_\_\_\_\_ past performance. *Id.* at 43. In its past performance evaluation of HTS, the TET reviewed written performance reports and contract daily diaries from contracting officer representatives, helicopter managers, and other government





... at least important technical evaluation factor. organizational

experience, HTS r.

this factor as a protests ground.

HTS does not include the Agency's evaluation of

### ARGUMENT

#### I. Introduction

HTS asserts the following three protest grounds: (1) the Agency's evaluations of HTS's aircraft technical capability and safety/risk management lacked a rational basis; (2) the Agency placed undue weight on one of four equally important past performance sub-factors; and (3) the Agency failed to conduct a proper best value analysis, partly because the technical evaluation was flawed, and partly because the Agency did not justify its decision to pay "premiums" for





and

<sup>11</sup> In light of this contrast, the TET's decision to rate HTS at a level

IV. The Agency's Decision to Award Contracts to Other  
Explained in the RFP and Supported by the Optimization Model and the TET's Technical  
Evaluations

The Agency interprets the final, "best value" protest ground as being based on two distinct arguments: First, the Agency's best value analysis was inherently flawed, because the Agency miscalculated HTS in three of the four technical factors. Second, the Agency failed to conduct a proper price/technical tradeoff analysis, because it did not

The first of these essentially restates HTS's first two protest grounds; i.e., the Agency underrated its technical proposal. The Agency's response to this -- that its technical evaluation was reasonable and based on the stated RFP factors -- is encompassed in the foregoing three sections of the Argument.

As to the second part of the "best value" protest ground, the Agency,

considered price

to be significantly less important than technical factors, a fact HTS conveniently omitted from its protest. That statement in itself should be sufficient explanation for the Agency's decision to

as Columbia, Heliquest, and Erickson.<sup>12</sup> However, the Agency did further document its best value analysis, as to each line item, in a Summarization of Recommended Awards. For example, the Summarization stated, with respect to Item 3:

<sup>11</sup> Regarding Heliquest, Tab 6, p. 87. F

<sup>12</sup> Indeed, more explanation would be required only if the protested line items had been awarded to HTS, whose

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Tab 5, p. 3. *See id.* at 3-5, regarding items 6, 7, 8, and 18.

\_\_\_\_\_ using Item 3 as an example, while HTS

\_\_\_\_\_, because technical

\_\_\_\_\_ the evaluation process. Moreover,

HTS's focus on its \_\_\_\_\_ ignores the existence of three  
other technical factors, including past performance,

Besides the Summarization's explanation for each line item, the TET Chair provided a  
general explanation of the OM, which assisted the TET in its analysis, stating, "[t]he  
Optimization Model that was used is a multiple-objective model with the overall objective of  
minimizing the increase in deviation from the optimum adjectival rating while also minimizing  
total cost and price per pound." In other words, the OM helped the Agency determine how to get  
the best price for any given line item, while compromising the least on its most important factor -  
- the technical evaluation.

That such tradeoffs are permissible is well established. "In a best value procurement

recommendations that were consistent with the RFP criteria. This, too, was permissible, as a reasonable attempt to simplify the evaluation process in a complex procurement. "Where, as here, an agency is faced with evaluating a significant number of proposals from offerors with wide and varied experience, coupled with the need to make a substantial number of awards to multiple contractors, an agency's reasonable attempt to simplify the source selection process is not objectionable." *Apex Marine Ship Management Company, LLC*, B-278276.25, B-278276.28, 2000 WL 1579762, at \*13 (Comp. Gen. 2000). In this case, the Agency was faced with awarding 34 line items, from a pool of 34 companies offering 88 different helicopters, each with its own price and technical information. It is exactly the sort of circumstance GAO found, in *Apex Marine*, would justify simplifying the source selection process by using numerical scores as guidelines, and by utilizing an optimization model.

HTS, but fails to mention anywhere in the protest that nonprice factors were "significantly more important than Price." Tab 7 p. 215 (emphasis added). Because this was a best value procurement, and not a "lowest price, technically acceptable"

procurement.

procurement, "[e]valuation of proposals is not limited to determining whether a proposal is merely technically acceptable; rather, proposals may be further differentiated to distinguish their relative quality by considering the degree to which technically acceptable proposals exceed the stated minimum requirements or will better satisfy the agency's needs." *Israel Aircraft Industries, Ltd.; MATA Helicopters Division*, B-274389, 1996 WL 768804, at \*4 (Comp. Gen. 1996). That is precisely what the Agency did in this case, when it determined Erickson,

Columbia, and Heliquest would better satisfy its needs,

V. The Agency Objects to the Protester's Request for a Hearing.

HTS has requested a hearing, pursuant to 4 CFR § 21.1(d)(3). However, both section 21.1 (addressing the contents of a protest) and section 21.7 (addressing hearings) of the Bid Protest Regulations require the protester to explain why a hearing "is needed to resolve the protest." HTS has not done so.

Protesters are not entitled to a hearing before GAO. Rather, GAO "may conduct a

Selection Plan (Tab 7, p. 1), the Request for Source Selection Authority (Tab 5, p. 1) and the TET Summarization of its recommendations for award (Tab 5, p. 10). Given the extent to which the Agency's decision is explained and documented, no oral examination of witnesses is required. In addition, a hearing would unduly burden the Agency, whose key witnesses are Agency employees located in Boise, Idaho, who are currently needed there to assist in the Agency's firefighting efforts.

Finally, to the extent that clarification of the documents in the Agency Report is deemed necessary, that clarification can be accomplished with a conference call. GAO "may hold a

\_\_\_\_\_ to clarify the record, or to obtain background